Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	
DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING	Docket No. 96-4 CARP DPRA

MEMORANDUM OF NMPA, SGA AND RIAA REGARDING DISPOSITION OF THE DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

National Music Publishers' Association, Inc. ("NMPA"), The Songwriters Guild of America ("SGA") and the Recording Industry Association of America, Inc. ("RIAA") (collectively the "Petitioners") submit this memorandum to express their views as to the appropriate disposition of this proceeding.

Because there is no basis for convening a CARP, for the reasons set forth below, Petitioners request that the Copyright Office adopt the proposed regulations concerning DPDs published by the Copyright Office on December 1, 1997, Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 62 Fed. Reg. 63506, as amended by the attached amendments, which were proposed by the United States Telephone Association ("USTA") to resolve issues raised in its comments on the proposed regulations. We understand the attached amendments to be acceptable to all parties as resolving USTA's comments.

As discussed below, we submit that the remaining issues, raised solely by the Coalition of Internet Webcasters ("CIW"), are outside the statutory jurisdiction of the

Copyright Office or a CARP and hence not cognizable objections to adoption of the proposed regulations.[1/]

No party -- not NMPA, SGA, RIAA, CIW, BMI or USTA -- has requested that the Copyright Office convene a CARP to determine the rates and terms for compulsory licenses with respect to DPDs. Nor has any party asserted objections to the regulations proposed by the Joint Petition that would legally warrant such a proceeding. In fact, with the sole exception of CIW, all parties have agreed to an amicable resolution of this matter.

Nonetheless, CIW continues to seek a declaration from the Copyright Office that streaming media activities do not constitute DPDs and thus are exempt from infringement liability under the Copyright Act. But as CIW itself admits, the determination of whether streaming media activities are exempt from the Copyright Act can be made only by Congress or the federal courts. It is not within the authority or jurisdiction of the Copyright Office, or a CARP, to determine whether streaming media activities are "DPDs" within the meaning of section 115 of the Copyright Act or whether such activities infringe the exclusive rights of owners of copyrights in musical works under the Copyright Act. Equally important, CIW, in the comments it filed on December 29, 1997, did not object to any of the royalty rates -- for either DPDs in general or incidental DPDs -- contained in the proposed regulations.

Rather -- over a month after the deadline set by the Copyright Office for filing comments concerning the proposed regulations and a month after the statutory deadline for filing a rate petition under section 115 of the Copyright Act -- CIW, while again asserting that it is "a matter for the courts" to determine whether streaming media infringe copyright owners' exclusive rights, for the first time suggested that "[i]f . . . streaming media technologies might be subject to the proposed regulations, then, [CIW had certain

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[1/] In view of the present posture of this proceeding, which presents no legal basis for arbitration or other contested proceedings, Petitioners reserve objection to the status of CIW as an appropriate party to this proceeding.

issues] that would be required to be addressed in an arbitration proceeding," including a "request for an exemption from royalty payments for performances via streaming media (assuming such technologies may be found to create Incidental DPDs or Transient Phonorecords)" and "[o]pposition" to the rate proposed in the regulations for incidental DPDs.[2/]

CIW's belated request for "an exemption from royalty payments" and its late-filed opposition to the proposed rate for incidental DPDs -- both couched in hypothetical terms ("if," "might," "may be") -- qualify neither as a timely petition pursuant to sections 115(c)(3)(D) and 803(a), nor as timely comments on proposed regulations of the Copyright Office and should be rejected.[3/] In no event do they warrant the empaneling of a CARP.

The Issue of Whether Streaming Media Are DPDs Is Not Within the Jurisdiction of the Copyright Office or a CARP to Determine

CIW requests that its members' streaming media activities be exempted by regulation from the exclusive reproduction and distribution rights of copyright owners under 17 U.S.C. § 106(1) and (3). But there simply is no support for the proposition that a CARP, or the Copyright Office, may decide whether certain activities -- in this instance, streaming media -- constitute copyright infringement. That determination is exclusively reserved by the Copyright Act for Congress and the federal courts. It plainly exceeds the scope of the authority of either the Copyright Office or a CARP.

[2/] Response of the Coalition of Internet Webcasters to the BMI Motion and the NMPA, SGA and RIAA Joint Reply comments at 2-3 (February 3, 1998) ("CIW Response"). Streaming media are the only activities possibly involving DPDs in which CIW professes in its pleadings to have a significant interest. However, CIW strenuously protests the characterization of streaming media as involving DPDs and urges that this is "a matter for the courts" to determine. *Id.*

[3/] The Copyright Office deadline for filing comments on the proposed regulations was December 29, 1997; CIW filed its comments on December 29, 1997 and additional comments (the CIW Response) on February 3, 1998.

Section 115 of the Copyright Act establishes that the authority of a CARP is limited "to determin[ing] and publish[ing] in the Federal Register a schedule of rates and terms" for the issuance of compulsory licences under that section. 17 U.S.C. § 115(c)(3)(D) (emphasis added).[4/] "Rates" refers to the royalty rates for compulsory licenses. "Terms" -- as confirmed by the legislative history of section 115 -- encompasses "such details as how payments are to be made, when and other accounting matters." Section-by-Section-Analysis, Digital Performance Right in Sound Recordings Act of 1995, 141 Cong. Rec. S11957-58, August 8, 1995 (daily ed.). Nowhere in section 115 or its legislative history is there any suggestion that a CARP has the authority to determine what activities constitute a DPD.

Indeed, the Copyright Office has recognized the limitations of the jurisdiction of a CARP convened under an analogous provision of the Copyright Act, 17 U.S.C. § 114(f)(2), and determined that "[t]here is no indication in the statutory language or in the legislative history that the scope of the terms should go beyond the creation of a workable administrative system and reach substantive issues, such as defining the scope of copyright infringement for those availing themselves of the statutory license." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, 25411-12 (May 8, 1998) (emphasis added). The Copyright Office explicitly instructed that "[f]or the Panel to fashion a term further delineating the issue of copyright infringement when Congress has already acted is an improper exercise of authority beyond that granted under the statute." *Id.* at 25412.

Such is the case here where CIW seeks a determination of whether streaming media activities are DPDs -- precisely the type of "substantive issue" the Copyright Office found to be beyond the jurisdiction of a CARP. Were a CARP to decide whether streaming media activities are DPDs, it would necessarily have to construe the term

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[4/] *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (statutory interpretation must begin with the language of the statute).

"DPD" as well as the scope of copyright owners' exclusive rights under the Copyright Act, thereby usurping the federal courts' authority to interpret the Copyright Act and define the scope of copyright infringement liability. Accordingly, to convene a CARP would be futile because -- regardless of how it decided the issue of whether streaming media activities are DPDs and thus acts of infringement -- its decision would have to be rejected as contrary to law. *See id.* (recommending that the Librarian reject as contrary to law a term adopted by a CARP purporting to define the scope of copyright liability).

CIW has itself recognized that this issue "is a matter for the courts to determine" (CIW Response at 2)(emphasis added) or "better left for resolution by Congress than the Copyright Office or a CARP" (CIW Comments at 2-3) (emphasis added).[5/]

Nonetheless, CIW persists in its effort to have the Copyright Office or a CARP declare as a matter of law that streaming media activities are exempt from the reach of the Copyright Act. In support, CIW urges that a "a linchpin" of proposed section 255.6(a) is "the proposal that '[i]n any future proceeding under 17 U.S.[C.] § 115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as "incidental" and the royalty rates payable for a compulsory license for Incidental DPDs shall be established de novo'" (CIW Response at 2). CIW contends that, by virtue of this language, the Copyright Office or a CARP is empowered to decide "whether particular technologies (such as streaming media) do not result in a DPD or an incidental DPD." *Id.*

[5/] In fact, even as CIW represented to the Copyright Office that it was negotiating to reach a settlement in this proceeding, CIW members, organized under the name Digital Media Association ("DiMA") and represented by CIW's counsel in this proceeding, were engaged in a lobbying effort to amend proposed legislation before Congress that would implement the WIPO treaties so as to exempt streaming media technology from copyright infringement liability -- the very relief CIW purports to seek from the Copyright Office or a CARP here. *See 7 Internet Music Firms Unite to Fight WIPO Bill*, Billboard Bulletin, June 18, 1998, at 1.

This argument is meritless. A regulation cannot confer power exceeding the mandate of the statute under which it is promulgated. In any event, CIW quotes a single clause of the regulations out of context. The complete language demonstrates that the reference in proposed Section 255.6(a) to the characterization of DPDs as "incidental" in future proceedings for purposes of establishing a royalty rate does not constitute -- as it cannot -- a legal judgment "whether particular technologies result in a DPD."[6/]

Similarly, none of the other issues raised by CIW is susceptible to resolution by a CARP. For example, CIW complains that proposed section 255.6(c)(1), which permits the making of DPDs of thirty seconds or less (or, for works of more than five minutes, the lesser of ten percent or sixty seconds) for promotional purposes without payment of a royalty, is "simply too rigid . . . . [C]lips of 31, 45 or 60 seconds, [CIW contends, are not] prejudicial to the economic interests of songwriters or sound recording producers" (CIW Comments at 5). But section 255.6(c)(1) does not purport to establish a rate for DPDs made by the Webcasters, but rather DPDs made by copyright owners -- either the owners of copyrights in musical works or the owners of copyrights in sound recordings -- and represents a reciprocal arrangement between such copyright owners, negotiated by private parties on an industrywide basis as a reasonable accommodation of their respective rights. CIW does not have standing to object to this arrangement; neither does a CARP have authority to substitute its judgment for an industrywide agreement

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[6/] That language reads:

> In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as 'incidental' and the royalty rates payable for a compulsory license for Incidental DPDs shall be established de novo *and no precedential effect shall be given to the characterization of a digital phonorecord delivery as "incidental" under this section or to the royalty rate payable under this section* for any period prior to the period as to which the characterization of a digital phonorecord delivery as "incidental" or the royalty rates are to be established in such future proceeding.

Proposed Regulations § 255.6(a) (emphasis added).

between the owners of copyrights in musical works and sound recordings where no such owners have objected.[7/]

CIW Filed No Timely Objection
To The Rates Proposed in the Joint Petition

Although CIW initially claimed that streaming media activities are not DPDs and, accordingly, "should be declared to be outside the reach of section 115 by the Copyright Office, in a manner that does not require intervention of or resolution by a CARP" (CIW Comments at 4), CIW has since reversed course and suggested, without requesting that a CARP be empaneled, that a CARP may provide them the relief they desire -- "an exemption from royalty payments for performances via Streaming Media (assuming such technologies may be found to create DPDs or Transient Phonorecords)" (CIW Response at 3) (emphasis added).

Putting aside the hypothetical nature of this suggestion (discussed above), nothing in the Copyright Act empowers the Copyright Office or a CARP to grant "an exemption" from copyright royalties. Even if viewed as a request for a "zero" royalty, CIW's request should be rejected, for several reasons.

First, in its original comments, CIW took the position that streaming media activities are beyond the scope of section 115 and thus beyond the regulatory authority of the Copyright Office (CIW Comments at 4). Accordingly, if CIW asserts that streaming media activities are not within the purview of section 115, it can provide no basis to convene a CARP for the purpose of obtaining an "exemption" from royalties for such activities.

Second, if CIW genuinely desired to have the Copyright Office or a CARP establish royalty rates for streaming media activities, it should have filed a timely petition

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[7/] Congress explicitly contemplated that voluntary negotiations between the interested parties (here the representatives of owners of copyrights in musical works and sound recordings respectively) could lead to industrywide agreements for adoption by rulemaking. Section-by-Section Analysis, 141 Cong. Rec. at S11957.

in 1997 pursuant to sections 115(C)(3)(D) and 803(a) of the Copyright Act requesting that such a rate be determined and detailing its members' "significant interest" in that rate. See also 37 C.F.R. §§ 251.61(a)(3), 251.62(a). CIW filed no such petition.

Third, CIW's request for an exemption was filed over a month after the deadline for comments on the proposed regulations and is thus procedurally improper.

Finally, this issue is not ripe for consideration by a CARP. CIW's members have never sought to avail themselves of the compulsory license available under section 115 and have expressed no interest in doing so now. Nor, to the best of our knowledge, has any member of CIW been sued for infringement by an owner of copyright in a musical work. Consequently, until such time as a court (or Congress) determines whether streaming media are DPDs, for a CARP to determine the applicable royalty rates would be premature and a waste of resources. In any event, the proposed regulations, if adopted, will be subject to revision in the year 2000, allowing CIW to file a petition, if it so desires, as early as January 1, 1999 -- less than six months from now.

Convening a CARP Would Be Unnecessary and Unfair

As CIW itself has said, the substantive question of whether streaming media activities infringe the exclusive rights of copyright owners and thus require a license "is a matter for the courts" (CIW Response at 2). We agree with CIW that this issue should be resolved by the courts if that should ultimately be necessary, whether or not that resolution is preceded by a burdensome and expensive CARP proceeding. In this proceeding, CIW has manifested at every opportunity a desire not to pay for the use of music in its members' businesses. Even if there were to be a CARP in this proceeding and the CARP set a rate for streaming media activities, we have no confidence that the members of CIW would seek mechanical licenses absent litigation to establish that their activities are DPDs.

Convening a CARP would simply extend further a proceeding that already has been unnecessarily long and burdensome for the parties, when none of the parties,

including CIW, seems to want a CARP. Indeed, it is particularly telling that in none of CIW's filings in this proceeding does CIW directly request that the Copyright Office convene a CARP.

It appears that CIW's primary interest in this proceeding is delay. Through repeated *Federal Register* announcements concerning this proceeding over a two year period, CIW had ample notice of this proceeding and Petitioners' negotiations concerning mechanical royalty rates for DPDs.[8/] Nonetheless, CIW expressed no interest in this proceeding until the last day of the comment period for the negotiated resolution of this proceeding. Since then, CIW has delayed the conclusion of this proceeding by approximately seven months, professing to negotiate in good faith while at the same time lobbying for legislation that would render such negotiations unnecessary.[9/] The Copyright Office should not reward CIW for its delay and intransigence in this proceeding by giving CIW more time to pursue its legislative strategy, and the other parties to this proceeding should not have to endure months of additional delay and the very high costs of a CARP to address a question that today, CIW acknowledges, remains hypothetical.

CIW's Interests Can Be Satisfied Without a CARP

Because a CARP does not have jurisdiction to decide the substantive question of whether streaming media activities are infringing, the only relief that CIW could obtain in this proceeding with respect to that question is assurance that the conclusion of this proceeding will not prejudice the ultimate resolution of that question by a court. We have previously suggested to CIW, and we now suggest to the Copyright Office, that the

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[8/] See Notice of Initiation of Negotiation Period, 61 Fed. Reg. 37213 (July 17, 1996); Notice of Precontroversy Discovery Schedule, 61 Fed. Reg. 65243 (December 11, 1996); Notice Vacating Precontroversy Discovery Schedule and Notice of Meeting, 62 Fed. Reg. 5057 (February 3, 1997); Notice of Proposed Rulemaking, 62 Fed. Reg. 63506 (December 1, 1997).

[9/] *See* note 5 *supra.*

proposed regulations be adopted with a preamble stating that the regulations do not determine whether streaming media activities constitute DPDs under the Copyright Act. Such a statement should allay any legitimate concerns of CIW, while leaving to the courts the question of whether streaming media activities are infringing -- a question that all the parties, including CIW, agree should be left to the courts.

Conclusion

Because no party has raised a timely objection to the proposed regulations that the Copyright Office or a CARP has authority to address, Petitioners respectfully request that the proposed regulations concerning DPDs, i.e., sections 255.5, 255.6 and 255.7, as amended, be adopted by the Copyright Office with a preamble stating that the regulations do not determine whether streaming media activities constitute DPDs under the Copyright Act.[10/]

Dated: July 21, 1998

Respectfully Submitted,

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10/ Because the attached amendments respond to comments filed by the parties in response to the Copyright Office's notice of rulemaking dated December 1, 1997, NMPA/HFA does not believe that the revised regulations need to be renoticed for further comments. 1 Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise §7.3 (3d ed. 1994) ("If an agency were required to issue a second notice and provide an opportunity for a second set of comments . . . the rulemaking process would be endless.").

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AMENDMENTS TO PROPOSED DPD REGULATIONS

In § 255.6(a):

Insert comma after "Except as . . . for every digital phonorecord delivery" and before "made on or after January 1, 1998, ..."

Add following sentence at the end: "Nothing in this paragraph shall imply that any particular incidental reproduction or distribution is or is not an incidental digital phonorecord delivery."

Substitute the following for § 255.6(b)

"(b) No royalty shall be payable for any transient reproduction of a phonorecord in temporary computer memory or digital storage intermediate to the communications system through which a digital phonorecord delivery is made, where such reproduction is made in the ordinary operation of such system to facilitate the transmission to the ultimate recipient. Nothing in this paragraph shall limit or impair any rights or remedies of the copyright owner of a work against any person who makes further reproductions from such transient reproductions for any purpose other than to facilitate the transmission to the ultimate transmission recipient. Nothing in this paragraph shall impair any rights or remedies of the copyright owner with respect to the ultimate reproduction by or for the ultimate transmission recipient of each digital phonorecord delivery. Nothing in this paragraph shall imply that any particular transient reproduction either is or is not a digital phonorecord delivery or is or is not an infringement of the copyright owner's rights."

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of July, 1998, served the foregoing Memorandum of NMPA, SGA and RIAA Regarding Disposition of the Digital Phonorecord Delivery Rate Adjustment Proceeding by overnight mail to the following counsel.

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